1-07-08

Nº. _____ 07-923

In The
Supreme Court of the United States

TAE KYONG KIM.
Petitioner,
v.
MICHAEL B. MUKASEY, ATTORNEY GENERAL,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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January, 2008

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Sixth Circuit had jurisdiction to consider a lawful permanent resident's statutory and constitutional challenges to the administrative denial of his cancellation of removal application.

2. Whether Petitioner was convicted of a "crime of domestic violence" where the state statute punishes conduct broader than that proscribed by 18 U.S.C. § 16(a).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Tae Kyong Kim respectfully petitions that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Sixth Circuit entered in this case on May 31, 2007, and October 10, 2007, respectively. The Sixth Circuit, in conflict with the Third, Seventh, Eighth, and Ninth Circuits, held that it lacked jurisdiction to review Petitioner's legal and constitutional challenges to the denial of his application for cancellation of removal as a lawful permanent resident under 8 U.S.C. § 1229b(a).

Moreover, Petitioner's conviction is not a "crime of domestic violence," as defined by 8 U.S.C. § 1227(a)(2)(E)(i) and 18 U.S.C. § 16(a) and, accordingly, he is not subject to removal.

OPINIONS BELOW

The opinion and orders of the Sixth Circuit Court of Appeals, App., *infra*, A1 and B1, are unreported. The opinions of the Board of Immigration Appeals, App., *infra*, C1 and E1, are unreported. The oral decisions of the Immigration Judge, App., *infra*, D1 and F1, are unreported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit, App., *infra*, B1, was entered on May 31, 2007. The court denied Petitioner's timely petition for rehearing on October 10, 2007, App., *infra*, A1. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Immigration and Nationality Act ("INA") grants the Attorney General the discretion to cancel the removal of a lawful permanent resident who:

> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
> (3) has not been convicted of any aggravated felony

8 U.S.C. § 1229b(a).

The INA circumscribes judicial review over agency decisions concerning cancellation of removal as follows:

(B) Denials of Discretionary Relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review –

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title.

...

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. §§ 1252(a)(2)(B), (D).

Noncitizens who commit the following types of crimes are removable:

> Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

8 U.S.C. § 1227(a)(2)(E)(i).

> A crime of violence means
>
> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or

> property of another may be used in the course of committing the offense.

18 U.S.C. § 16.

> Michigan law provides that
>
> (2) Except as provided in subsection (3) or (4), an individual who assaults or assaults and batters his or her spouse or former spouse, an individual with whom he or she has or has had a dating relationship, an individual with whom he or she has had a child in common, or a resident or former resident of his or her household, is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both.

M.C.L. § 750.81(2).

STATEMENT

(i) Nature of the Case

This case presents two important and recurring questions. The first is to what extent the courts of appeals have jurisdiction to review the statutory and constitutional issues raised in a lawful permanent resident's challenge to the administrative denial of his application for cancellation of removal. The second is whether a

state statute punishing simple assault or assault and battery is a "crime of violence" under 18 U.S.C. § 16(a).

(ii) Factual Background

Mr. Tae Kyong Kim is a 52-year-old citizen of Korea. He was admitted to the United States as an immigrant on November 11, 1978 and has since continuously resided here as a lawful permanent resident. His four children are native-born United States citizens.

On March 27, 2000, Mr. Kim pled guilty to simple assault - domestic violence, in violation of M.C.L. § 750.81(2). On July 24, 2000, the Immigration and Naturalization Service ("INS")[1] placed him in removal proceedings by issuing a Notice to Appear ("NTA") alleging that he was subject to removal under 8 U.S.C. § 1227(a)(2)(E)(i). This offense subjected Mr. Kim to removal only because of the identity of his victim and if it had

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[1] The Homeland Security Act abolished the INS effective March 1, 2003 and transferred its functions to various agencies within the Department of Homeland Security. Pub. L. No. 107-296, 116 Stat. 2135, 2192. The BIA and the Immigration Court remain part of the Department of Justice. This petition refers to the INS with respect to actions it took during its existence and to the appropriate agencies for events occurring after March 1, 2003.

been committed against a stranger, it would not have subjected him to removal or inadmissibility.

(iii) Agency Proceedings

In removal proceedings conducted in Detroit, Michigan, Mr. Kim conceded removability and applied for cancellation of removal under 8 U.S.C. § 1229b(a). On October 16, 2001, following a merits hearing, the Immigration Judge ("IJ") denied his applications for relief. The IJ found Mr. Kim statutorily eligible for cancellation of removal and concluded that he presented considerable positive equities and had an otherwise approvable case. App., *infra*, F1. Still, she denied his claim based on perceived inconsistencies in the testimony and what she concluded was Mr. Kim's false testimony. *Id.*

Mr. Kim timely appealed to the Board of Immigration Appeals ("BIA"). On July 23, 2002, the BIA remanded the case to the IJ because one of the hearing tapes was almost completely blank. App., *infra*, E1.

The IJ conducted an additional merits hearing on remand. On December 10, 2004, the IJ again denied Mr. Kim's cancellation of removal

application and ordered him removed to Korea. She noted that she would have granted his application but for what she perceived was Mr. Kim's false testimony. App., *infra*, D1.

Mr. Kim timely appealed to the BIA. The BIA adopted and affirmed the IJ's decision. App., *infra*, C1. The BIA cited Mr. Kim's 2000 conviction, his lack of candor at the October 16, 2001 hearing concerning the state of his marriage, and insufficient evidence of Mr. Kim's genuine rehabilitation and remorse. *Id.*

(iv) The Sixth Circuit's Decision

The Sixth Circuit issued summary decisions denying Mr. Kim's petitions for review and rehearing. App., *infra*, B1 and A1. The court concluded that it lacked jurisdiction to review the denial of Mr. Kim's application for cancellation of removal.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's decision is in conflict with decisions from the Third, Seventh, Eighth, and Ninth Circuits. Solano-Chicas v. Gonzales, 440 F.3d 1050, 1054-55 (8th Cir. 2006); see also Alaka v. Attorney General of U.S., 456 F.3d 88, 103-104 (3d

Cir. 2006); Cabrera-Alvarez v. Gonzales, 423 F.3d 1006, 1009 (9th Cir. 2005); Morales-Morales v. Ashcroft, 384 F.3d 418, 421 (7th Cir. 2004). The court's decision also conflicts with its own published decisions concerning the extent of its jurisdiction. Abu-Khaliel v. Gonzales, 436 F.3d 627, 631, 633-34 (6th Cir. 2006); Santana-Albarran v. Ashcroft, 393 F.3d 699, 703 (6th Cir. 2005). In a similar context, the Court had jurisdiction under this statute to reverse the BIA's decision and remand for reconsideration when the BIA applied the wrong legal standard and held the noncitizen to the wrong burden of proof. Tran v. Gonzales, 447 F.3d 937, 943-44 (6th Cir. 2004).

Moreover, Mr. Kim's conviction for violating M.C.L. § 750.81(2) is not a "crime of violence" and therefore does not subject him to removal under 8 U.S.C. § 1227(a)(2)(E)(i). The Michigan statute is not a crime of violence under 18 U.S.C. § 16(a) because it can be violated by an unlawful touching and does not require the use of physical force.

I. The Decision Of The Sixth Circuit Conflicts With Those Of Other Circuits Finding Jurisdiction to Review Statutory And Constitutional Challenges To Denials of Cancellation Of Removal Applications

Congress has specifically provided for judicial review of the legal and constitutional questions raised by the denial of Mr. Kim's application for cancellation of removal. 8 U.S.C. § 1252(a)(2)(D); Abu-Khaliel, 436 F.3d at 631, 633-34; Santana-Albarran, 393 F.3d at 703. Thus while 8 U.S.C. § 1252(a)(2)(B) deprived the Sixth Circuit of jurisdiction to review the discretionary denial of Mr. Kim's application, section (D) granted the court the jurisdiction to "consider the predicate legal question whether the [BIA] properly applied the law to the facts in determining an individual's eligibility" for cancellation of removal. Solano-Chicas, 440 F.3d at 1054-55 (internal citations omitted); see also Alaka, 456 F.3d at 103-104 (whether the BIA applied the wrong legal standard is a question of law); Cabrera-Alvarez, 423 F.3d at 1009 (interpretation of cancellation of removal statute is a question of law); Morales-Morales, 384 F.3d at 421 (jurisdiction to determine whether the BIA reviewed a cancellation of removal application under the correct interpretation of the law).

The agency committed several serious legal errors in denying Mr. Kim's application for cancellation of removal. These legal errors were material and prejudiced Mr. Kim. The Sixth Circuit had jurisdiction to review these claimed errors. The BIA's ability to deny an application for cancellation of removal as a matter of discretion is not boundless and is constrained by Congress, the regulations, and the BIA's own precedent.

The BIA, as an appellate body, cannot make its own findings of fact, other than to take administrative notice of commonly known facts. 8 C.F.R. §§ 1003.1(d)(3)(i), (iv). However, the BIA went beyond the IJ's decision to make its own findings concerning Mr. Kim's eligibility for cancellation of removal. The Sixth Circuit had jurisdiction to review whether the BIA engaged in impermissible fact-finding and whether it evaluated the findings of fact under the proper legal standard.

The BIA gave three reasons for denying his application. First, the BIA noted that Mr. Kim's conviction is an adverse factor. App. *infra*, C1. Second, the BIA referred to Mr. Kim's lack of

candor over the state of his marriage when he testified in 2001. *Id.* Finally, the BIA agreed with the IJ that Mr. Kim did not submit proof of his genuine rehabilitation or remorse. *Id.*

The Department of Homeland Security ("DHS") twice noted that on paper, Mr. Kim's case appeared to be a "slam dunk grant." His case is stronger than the one confronted by the BIA in Matter of C-V-T, 22 I. & N. Dec. 7 (BIA 1998). Mr. Kim had a longer period of residency (23 years versus 15 years), had been convicted of a less serious offense (domestic violence versus drug possession), and had substantial family ties to the United States. See C-V-T, 22 I. & N. Dec. at 13-14.

The IJ misstated the seriousness of Mr. Kim's conviction. She believed that he was convicted of "aggravated domestic violence." App., *infra*, F1. This is incorrect. Although Mr. Kim was charged with assault with a deadly weapon, he pled guilty to the reduced charge of domestic violence in violation of M.C.L. § 750.81(2).

Mr. Kim had problems remembering dates and details or understanding the questions during his testimony. For example, he did not remember

when he was divorced and repeatedly testified that he believed it was in 2002, when the objective evidence showed that it was in 2001. At his second merits hearing, he did not remember why his wife was absent from his first hearing, even though he previously testified, and her passport showed, that it was because she was in Korea. Being a poor witness is different from being a poor lawful permanent resident.

Given his obvious difficulty in testifying, Mr. Kim clearly did not intend to deceive the IJ about that state of his marriage at the time of his October 2001 hearing. He and his ex-wife both testified that although he moved out of the house after she filed for divorce, he continued to spend a considerable amount of time there. They tried to reconcile during that period. His ex-wife testified that while they were "applying for divorce," they briefly got back together.

In violation of its own precedents, the BIA required Mr. Kim to show rehabilitation or remorse. See C-V-T, 22 I. & N. Dec. at 12. The applicant in C-V-T did not prove actual rehabilitation or remorse but the BIA noted that he had only been convicted of one crime in the United

States and he promised to not break the law again. Id. Mr. Kim was convicted of only one crime in the United States. He completed 36 weeks of anger management class and learned to manage and control his anger and tone. He feels very sorry about what happened and had learned from his mistake and promised that he would not hurt someone else. For the BIA to require additional evidence is a substantial and unreasonable departure from its prior precedent.

As a long-term lawful permanent resident, Mr. Kim has a due process right to a full and fair hearing. Mathews v. Diaz, 426 U.S. 67, 77 (1976). Mr. Kim has been a lawful permanent resident since 1978, has four United States citizen children, including one who is serving in the military, most of his family lawfully resides in the United States, and he has been a successful entrepreneur who created numerous employment opportunities for American workers. Congress has granted him eligibility for cancellation of removal.

One of the overriding purposes of American immigration law is to encourage family unity. "The plain congressional purpose in providing preferential status for entry of immigrants closely

related to American citizens was to facilitate and foster the maintenance of families, such as here involved." Matter of Lashkevich, 12 I. & N. Dec. 22, 26 (BIA 1966).

The principle of narrow construction of the civil provision of the INA developed contemporaneously, but independently, of the rule of lenity applicable to federal criminal statutes. The Court "resolve[s] the doubts in favor of that [narrow] construction because deportation is a drastic measure and at times the equivalent of banishment or exile.' It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948); see also Leocal v. Ashcroft, 543 U.S. 1, 12 n.8 (2004); Matter of Farias-Mendoza, 21 I. & N. Dec. 269 (BIA 1996).

The Sixth Circuit's decision is in conflict with decisions from the Third, Seventh, Eighth, and

Ninth Circuits. The court had jurisdiction to consider the statutory and constitutional issues raised in Mr. Kim's petition. Solano-Chicas, 440 F.3d at 1054-55; see also Alaka, 456 F.3d at 103-104; Cabrera-Alvarez, 423 F.3d at 1009; Morales-Morales, 384 F.3d at 421.

II. Petitioner Has Not Been Convicted Of A Crime Of Violence

Mr. Kim is not removable under the only charge contained in the Notice to Appear, 8 U.S.C. § 1227(a)(2)(E)(i), because he has not been convicted of a "crime of violence." The DHS alleged that his conviction for "domestic violence" in violation of M.C.L. § 750.81(2), is a crime of domestic violence. The Michigan statute is not a crime of violence under 18 U.S.C. § 16(a) because it can be violated by an unlawful touching and does not require the use of physical force.

The DHS has the burden of proving by "clear and convincing evidence" that Mr. Kim is removable. 8 U.S.C. § 1229a(c)(3)(A); Pickering v. Gonzales, 465 F.3d 263, 268-69 (6th Cir. 2006). In satisfying this burden, the DHS is limited to the record of conviction, which is the "statutory definition, charging document, written plea

agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." Shepard v. United States, 544 U.S. 13, 16 (2005). The elements of 18 U.S.C. § 16 require courts to look at the elements and nature of the offense of conviction and not the particular facts of the crime. Leocal, 543 U.S. at 7.

A noncitizen who is convicted of a crime of domestic violence after admission is subject to removal. 8 U.S.C. § 1227(a)(2)(E)(i). A "crime of violence" is "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a).[2] "Force" is "synonymous with destructive or violent force." U.S. v. Landeros-Gonzales, 262 F.3d 424, 426 (5th Cir. 2001) (internal citations omitted); see also Flores v. Ashcroft, 350 F.3d 666, 672 (7th Cir. 2003) (the force must be violent in nature). Slight force is inconsistent with destructive or violent force.

An "individual who assaults or assaults and batters his or her spouse ... is guilty of a misdemeanor." M.C.L. § 750.81(2). Michigan law

[2] The second prong of this definition, in 18 U.S.C. § 16(b), does not apply to this case because Mr. Kim was convicted of a misdemeanor, not a felony.

defines "simple assault" as "either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." People v. Terry, 217 Mich. App. 660, 662, 553 N.W.2d 23 (Mich. Ct. App. 1996). A battery is "the consummation of an assault." Id. Michigan defines battery as the "willful touching of the person of another by the aggressor or by some substance put in motion by him." Klein v. Long, 275 F.3d 544, 551 (6th Cir. 2001). The statute can be violated by spitting. Terry, 217 Mich. App. at 662.

A person can violate the Michigan statute by a mere "willful touching," including spitting. Violation of the statute does not require the use, attempted use, or threatened use, of "physical force." Intentionally causing physical contact where great bodily harm can result is not a "crime of violence" because "physical contact is not the equivalent of physical force." Larin-Ulloa v. Gonzales, 462 F.3d 456, 466 (5th Cir. 2006). To qualify as a crime of violence, the statute must require that a defendant intend to injure or use force on the victim or that the physical contact itself be violent, harmful, or offensive. Id.; see also Ortega-Mendez v. Gonzales, 450 F.3d 1010 (9th Cir.

2006) (simple battery is not a crime of violence where that statute can be violated by "mere offensive touching"); Popal v. Gonzales, 416 F.3d 249 (3d Cir. 2005) (simple assault is not a crime of violence); Flores, 350 F.3d 666 (common law battery conviction is not a crime of violence because although the statute requires an intent to touch, it does not require an intent to injure and the statute can be violated by any contact, however slight).

A person can violate M.C.L. § 750.81(2) without using "physical force" against the person or property of another. It can be violated through any unlawful contact, including spitting, and does not require the use of physical or violent force. Therefore, the DHS cannot sustain the charge that a conviction of violating this statute is a crime of violence. Mr. Kim respectfully requests that the Court terminate his removal proceedings.

CONCLUSION

Petitioner respectfully submits that the Sixth Circuit erred in the following respects:

The court had jurisdiction to consider Petitioner's legal and constitutional challenges to the denial of his application for cancellation of removal. Petitioner is not removable because he has not been convicted of a "crime of violence."

Therefore, Petitioner respectfully prays that the Court grant his petition for writ of certiorari and reverse the decisions of the Sixth Circuit Court of Appeals and the BIA.

Respectfully Submitted,

Marshal E. Hyman
Counsel of Record
Russell Reid Abrutyn

APPENDIX

SIXTH CIRCUIT COURT APPEALS FILINGS:

Order Denying Rehearing,
filed 10/10/07 ..... A1 - A2

Opinion,
filed 05/31/07 ..... B1- B3

BOARD OF IMMIGRATION FILINGS:

Decision of the Board of
Immigration Appeals,
filed 06/16/06 ..... C1 - C6

Amendment to Oral Decision
of the Immigration Judge,
filed 12/10/04 ..... D1 - D10

Decision of the Board of
Immigration Appeals,
filed 07/23/02 ..... E1 - E3

Oral Decision of the
Immigration Judge,
filed 10/11/01 ..... F1 - F28

No. 06-3991

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TAE KYONG KIM,

Petitioner,

v. ORDER

ATTORNEY GENERAL OF
THE UNITED STATES,

Respondent.

BEFORE: GILMAN, GIBBONS, and GRIFFIN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

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Filed: May 31, 2007

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U.S. Department of Justice
Office of Immigration Litigation
P.O. Box 878
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RE: 06-3991
Kim vs. Gonzales
District Court No. A36 511 667

Dear Counsel:

Enclosed is a copy of an order which was entered today in the above styled case.

Very truly yours,

/s/ Florence P. Ebert
Florence P. Ebert
Case Manager

Enclosure

Case No: 06-3991

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

TAB KYONG KIM
Petitioner

v.

ALBERTO GONZALES
Respondent

BEFORE: GILMAN, GIBBONS and GRIFFIN, Circuit Judges

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

It is **ORDERED** that this petition for review is **AFFIRMED** for the reasons stated from the bench.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 200
Falls Church, Virginia 22041

Owen, Charles S., Esquire
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Office of the District Counsel/DE
333 Mt. Elliott St., Rm. 204
Detroit, MI 48207

Name: KIM, TEA KYONG A36-511-667

Date of this notice: 06/16/2006

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,
/s/ Frank Krider
Frank Krider, Chief

Clerk
Enclosure

Panel Members:
HESS, FRED

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision fo the Board of Immigration Appeals

File: A36 511 667 - Detroit Date: June 16, 2006

In re: TEA KYONG KIM a.k.a Tae Kyong Kim

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Charles S. Owen,
Esquire

ON BEHALF OF DHS: Michael B. Dobson
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(E)(i), I&N Act [8 U.S.C. §1227(a)(2)(E)(i)]-Convicted of crime of domestic violence, stalking, or child abuse, neglect, or abandonment

APPLICATION: Cancellation of removal

ORDER:

PER CURIAM. We adopt and affirm the December 10, 2004, decision of the Immigration Judge.[1] *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision"). The Immigration Judge properly found the respondent to be ineligible for a discretionary grant of cancellation of removal based on a balancing of the positive and negative factors in his case, including his 2000 conviction for domestic violence against his former wife which resulted in her physical injury.[2]

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[1] This case was last before us on July 23, 2002, when we remanded because of a defective transcript. The Immigration Judge issued a second oral decision on December 10, 2004, amending her original oral decision of October 16, 2001.

[2] An additional significant negative factor mentioned by the Immigration Judge is the respondent's . lack

Matter of C-V- T-, 22 I&N Dec. 7 (BIA 1998); *Matter of Sotelo*, 23 I&N Dec. 201 (BIA 2001). In addition, we agree with the Immigration Judge that the record does not contain sufficient evidence of genuine rehabilitation or remorse which would tip the balance of the equities in the respondent's favor.

On appeal, counsel alleges, without any citations to relevant supporting Board or circuit case law, that the respondent was not properly placed under oath in the Korean language at the hearing, and he appears to suggest that the Immigration Judge was holding the respondent criminally responsible for perjury and providing false testimony. However, we note that immigration proceedings are civil in nature, and not criminal, and that it does not appear that the Immigration Judge was suggesting

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of candor at the October 16, 2001, hearing because he suggested that be and his wife had reconciled and were living together when, in fact, divorce proceedings had been initiated in January 2001, and the divorce became final on October 30, 2001.

in any fashion that the respondent had committed the elements necessary for a criminal conviction for peljury. Furthermore, we observe that the respondent was represented at the hearing by the same counsel who represents him on appeal, and that counsel initially proceeded with his direct examination of the respondent without the assistance of an interpreter before the Immigration Judge requested an interpreter at the hearing. Finally, we note that the respondent, who is a 50-year-old successful businessman and who has been in the United States since 1978, was placed under oath before his direct examination (Tr. at 15), he answered in the affirmative in English that he agreed to testify truthfully, and therefore it appeared he fully understood his obligation to testify truthfully. Upon review, counsel's arguments on appeal do not persuade us that the Immigration Judge's decision should be reversed. Accordingly, the appeal is dismissed.

/s/ Frederick D. Hess
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW UNITED STATES IMMIGRATION
COURT
Detroit, Michigan

File No.: A 36 511 667 December 10, 2004

In the Matter of	)	
	)	
TAE KYONG KIM	)	IN REMOVAL
	)	PROCEEDINGS
Respondent	)	

CHARGE: Section 237 (a) (2) (E)(i) of the Immigration and Nationality Act, as amended.

APPLICATIONS: Section 240A(a) of the Immigration and Nationality Act, as amended - cancellation of removal for a permanent resident.

ON BEHALF OF RESPONDENT:

Charles S. Owen
Attorney at Law
25899 West 12 Mile Road
Suite 120
Southfield, Michigan

ON BEHALF OF DHS:

Michael B. Dobson
Assistant Chief Counsel
3331 Elliott
Detroit, Michigan 48207

AMENDMENT TO ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

This case comes before the Court upon a remand from the Board of Immigration Appeals. One of the tapes in the proceedings apparently did not record, and the Court has taken a new application (see Exhibit R-1, with attached exhibits tabbed 1 through 12), reflecting the divorce decrees of Respondent as well as payments of child support, copy of a military identification for his oldest child and tax returns (Exhibit R-1). The Court has also permitted additional testimony from Mr. Kim concerning the hearing, and direct examination with his counsel, as well as attempts to reconcile some of

the inconsistencies and false statements in the earlier hearing.

Respondent today has testified that although he had a slight problem with his heart sometime between 2001 and 2003, it required only one visit to the doctor, and he has testified that he has taken no medication, prescription or otherwise and has no mental disability or illness or personality disorder which affects his memory

The Respondent further testified on cross-examination by Government counsel. The Government counsel questioned the Respondent concerning inconsistencies in the first application wherein the Respondent claimed to have been married only twice before. Today the Respondent asserts he has been married three times. The Respondent was also questioned concerning his prior testimony about his third wife. The Court notes that Exhibit 7 is a divorce decree between Respondent and Myong Kim, dated October 30, 2001. On direct examination, the Respondent testified that as soon as his wife filed for divorce, some four to six months

prior to the final decree, which Respondent now on direct examination claimed was in 2002, he moved out of the home. Later he claimed to have returned to see the children and stayed with the children when his wife was not in the home. The Court notes, as Government counsel pointed out, and the Court takes judicial notice of the fact that Michigan law provides that where minor children are involved in a divorce decree, the State of Michigan requires at least six months pass between the filing of a petition for a divorce and the entry of any final order. The Respondent was given several, indeed the Court might say numerous opportunities to reconcile his testimony in his first hearing with his testimony today, and the Respondent repeatedly reiterated that he did not lie. He was not lying then. He was not lying now. Although the Court notes the testimony at the first hearing indicates the Respondent claimed in 2001 to have reconciled with his spouse after the domestic violence conviction; that they were living together as husband and wife with their three children; and no mention was made of any divorce.

Testifying today was Myong Kim, who testified that she now lives in Atlanta. She has naturalized and become a citizen of the United States. She stated that she filed for divorce in 2001, could not recall when, believed that the divorce took approximately six to seven months, and was done in October of 2001. The witness testified that her husband had been previously married only one time, although Respondent today asserts two prior marriages. The witness testified that October 11, 2001, she was not certain where she was, although she presented a passport showing that from October 4th until October 19th, she was in Korea. Initially questioned by counsel concerning reconciliations, she first stated in December of 2001 she sought a reconciliation with her husband, which failed. Then, when questioned as to whether or not her husband had stayed overnight at the home on High Meadow between the filing of the divorce and the divorce decree on two occasions, she indicated that he stayed there in December of '01, then she stated he stayed there prior to the filing of the divorce; and, on the fourth questioning,

stated that it was possible that he had stayed.

The witness testified that Mr. Kim after divorce has paid $1500 a month for the support of the three children. She further testified that she and the three children moved to Atlanta in August of 2004, and that since that time, Mr. Kim pays $3,000 a month to support the household. Mr. Kim testified that he provided an additional $1300 or the $1500 a month to pay for rent for his wife's home. Ms. Kim testified she lives with Mr. Kim's sister Ms. Kim testified that she moved to Georgia because her restaurant went bad, and she is unable to work currently because she has an injury to her arm. She has presented no medical evidence of that.

The Court notes that it is interesting that Ms. Kim, who acknowledged that she was aware of the immigration proceedings against her husband in October of 2001[1] Ms. Kim, for the first hearing, did

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[1] In January of 2001, prior to the claimed filing date of the divorce, the first notice of final hearing was served upon Mr. Kim in open court. The date for the first hearing was set for October 16, 2001, and was changed on September 6, 2001, to a hearing on

not file an affidavit. She did not appear and testify, and there was no explanation at that time which was credible. At that time, Mr. Kim and his witnesses testified that the parties lived together as husband and wife and were happily married. It is clear today from Ms. Kim's testimony and Mr. Kim's testimony and the additional evidence that the parties were certainly separated at the time of hearing, that divorce petitions had been filed, that a divorce was in fact imminent, and that property divisions had been made since Ms. Kim testified that she sold her share of the parties' assets, the business share of the parties' assets near September 11, 2001. When questioned by the Court as to why she appeared today to testify and whether or not there was a monetary reason for that, Ms. Kim denied that, stating that she came because her children love their father, and she would be unable to raise the children alone. However, the Court notes that Ms. Kim has elected to move out of the state, obtaining permission

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October 11th .

from the court as required by the divorce decree, to another state. It is also interesting to note that when Ms. Kim left the state, her husband raised the monies being paid to her by another $1500 a month. Ms. Kim has stated that she has sold the house which she was awarded free and clear and the business that she was awarded free and clear in the divorce settlement in 2001. The business in which she invested these monies has failed, and it appears that the financial motive in this case is stronger than her children's desire for their father to remain, since at the earlier hearing she did not appear and does today.

The Court finds no reason to change its earlier decision in this case. The Respondent clearly provided false testimony on October 11, 2001, to obtain a benefit that is cancellation of removal from this Court. As pointed out by Mr. Dobson, this is a case which on its face appeared to be a virtual grant. The Respondent has long residence in the united States. He has four United States citizen children, one of whom is serving in the armed forces today. He

is a business owner and clearly has supported the three minor children since his divorce in amounts over and above that ordered by the court. There was no reason for this Respondent to lie about the state of his marriage. If he had told the truth, relief would have been his. He did not. By perjuring himself in the testimony concerning the application, the Court finds that that is so serious and egregious a matter that the relief of cancellation of removal was denied, and finds no reason to alter its order on this date. Based on the foregoing and having considered both the prior record and all of the evidence in this record, the Court sees no reason to change the order denying the Respondent's request for cancellation of removal as a permanent resident and reinstating its order of deportation to Korea on the charges contained in the Notice to Appear.

/s/ Elizabeth A. Hacker
ELIZABETH A. HACKER
U.S. Immigration Judge

U.S. Department of Justice
Executive Office of Immigration Review

Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Owen. Charles S . Esquire
25899 West 12 Mile Road, Suite 120
Southfield, MI 48034-0000

Office of the District Counsel/DE
333 Mt. Elliott St., Rm. 204
Detroit, MI 48207
Name: KIM, TAE KYONG A36-511-667

Date of this notice: 07/23/2002

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ Lori Scialabba
Lori Scialabba
Acting Chairman

Enclosure

Panel Members:
PADLEY, ROGER

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision fo the Board of Immigration Appeals

File: A36 511 667 - Detroit Date: July 23, 2006

In re: TEA KYONG KIM

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Charles S. Owen,
Esquire

The respondent has appealed the Immigration Judge's decision rendered on October 16, 2001.[1] A review of the record of proceeding reveals that tape #2 containing a portion of the testimony of the October 16, 2001, hearing is blank. The transcriber

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[1] The October 11, 2001, date on the transcript and written Immigration Judge's decision is incorrect. The Immigration Judge held the proceedings and rendered her decision on October 16, 2001.

notes that "there are only two sentences on tape two, when it gets switched to tape three." As we consider the transcript necessary for our review of this matter, we will return the record to the Immigration Court for further action. Upon receipt of the record, the Immigration Court shall take such steps as are necessary and appropriate to enable preparati9n of a complete transcript of the proceedings including a new hearing, if necessary.

ORDER: The record is returned to the Immigration Court for further action as appropriate and certification to the Board by the Immigration Judge thereafter.

/s/ Ryan A. Pally
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW UNITED STATES IMMIGRATION COURT
Detroit, Michigan

File No.: A 36 511 667 October 11, 2001

In the Matter of	)	
	)	
TAB KYONG KIM	)	IN REMOVAL
	)	PROCEEDINGS
Respondent	)	

CHARGE: Section 237(a)(2)(E) of the Immigration and Nationality Act, as amended-after admission, convicted of a crime of domestic violence, crime of stalking, or crime of child abuse, child neglect, or child abandonment.

APPLICATIONS: Section 240A(a) of the Immigration and Nationality Act, as amended- cancellation of removal for a permanent resident.

ON BEHALF OF RESPONDENT:
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South Hill, Michigan 48034

ON BEHALF OF SERVICE:
Michael B. Dobson
Assistant District Counsel
333 Mount Eliot
Detroit, Michigan 48207

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

The respondent is a 46-year-old male, married, native and citizen of Korea. The Immigration and Naturalization Service issued a Notice to Appear charging the respondent with being subject to removal on the grounds set forth above. The instant proceedings were commenced by that filing of that Notice to Appear with Immigration Court. See Exhibit 1; 8 C.F.R. 3.14(a).

In a hearing before the undersigned, the respondent, through counsel, admitted that he was not a national or citizen of the United States but rather a native and citizen of Korea. The respondent

admitted that he entered the united States at Honolulu, Hawaii, on or about November 11, 1978, as an immigrant. The respondent further admitted that he was convicted on March 27, 2000, in the 47th District Court in Farmington, Michigan, for the offense of domestic violence in violence of Michigan Compiled Laws (M.C.L. Section 750.82). The respondent further conceded that he was subject to removal under Section 237(a) (2) (E) (I) of the Act. The Immigration and Naturalization Service provided certified copies of the conviction records for the alleged offense. See Exhibit 2. Based on the evidence of record, the charges of removal are sustained by the standard of clear and convincing evidence. Section 240(c) (3) of the Act.

The respondent designated Korea as the country to which removal would be directed. The alien requested an opportunity to file application for the relief of cancellation of removal for permanent residence under Section 240A of the Act. No other forms of relief were requested.

FACTS

The evidence at hearing consisted of the respondent's application for cancellation of removal. See Exhibit 3, the aforementioned conviction records, copies of police report for this offense (see Exhibit 4), as well as photographs of the weapon and victim (see group Exhibit 4, tab A).[1] In addition, the respondent submitted copies of the birth records for his three united States citizen children, a copy of a marriage certificate between the respondent and his spouse, a copy of a letter from his social worker relating the respondent's treatment at a anger management sessions which were directed by the court, a letter from a Korean-American Women's Association, a letter from a Kyong Im and Sung H. Kim, photographs of the respondent and his children, correspondence from the children to the respondent (tab 9, subtabs A through F), a copy of the naturalization certificate for an Ok Kyong Stewart, application for a vehicle title from May 19, 1993, loans from the Madison National Bank 1992, tax returns from 1993 to 2000, a letter from a certified

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[1] Because of the copying of photographs, the Court has retained original copies of the photographs which are maintained in the record.

public accountant, Jung Lee, who is purportedly the accountant for the respondent's businesses, W-4s for the employees of the Cherry Beauty Department, and the 2000 tax returns for the Cherry Beauty Department and New York Hair Inc., as well as a copy of a mortgage for the respondent's home. See group Exhibit 5. The Immigration and Naturalization Service, as a matter of impeachment evidence, has submitted a copy of the respondent's immigrant visa, the cover page, the application, as well as underlying conviction records. See Exhibit 6.

The respondent presented his testimony as well as the testimony of two witnesses. The respondent was the first individual to testify before the Court. The respondent testified that he has been married for 11 years. He has four children, one son from a first marriage and then three daughters from his current marriage. The respondent was questioned about where his wife and children live and he initially testified that they lived at his home. The respondent later clarified indicating that his 13-year-old son has not resided with him since approximately January 2000 when he sent the child to live with the child's grandfather in California and has had no contact with that child since that time period.

The respondent testified that he has a mother and three brothers and four sisters who live in the United States. The respondent testified that one sister lives in Korea. He states that his father is deceased. The respondent indicated that he has three brothers who are residing Indiana, one sister in Georgia, one in Chicago, one in Michigan, and one in Florida. The respondent indicates that his mother resides with his sister who resides in Florida.

The respondent testified that his three children are 10, 8, and 6. They are currently attending school. He indicated the children speak a little Korean, however they do not write Korean, indicating they write what he describes as simply American.

The respondent testified that he owns a business, the Cherry Hill Beauty Department, and has owned that business for 11 years. He indicated that he has four locations, one at Cherry Hill and Inkster, one at Ten Mile and Coolidge, one on Schaeffer, and another location. He states that he owns all of these businesses employing 12 employees. Each location is autonomous and he has managers at various locations. He states that he is involved in the day-to-day operation of the business indicating that he works there for approximately 72 hours. The respondent testified that if he were not present in the

United States his business would not be able to operate because it would be bankrupt because there would be no owner present. The respondent testified that he manages the employees, the customers, and purchases products as his part of the organization of his business. The respondent initially claimed that the total volume of his business per year was about two million dollars. Questioned as to what his annual payroll was, he indicated that he did not recall at this time.

Under direct examination, the respondent was questioned by his counsel as to how many times he had been arrested. He indicated to his counsel that it was the first time and that alcohol was not involved in this arrest. The respondent stated that alcohol has never been a factor, and was not a factor in this instance of domestic violence. The respondent did indicate that he did 36 weeks of court-ordered anger management counseling concluding this approximately four months ago. The respondent testified that he learned from this how to manage his anger and how to control his temper and live for his family. The respondent testified that the police had never been to his home other than this instance.

The respondent testified that on January 4, 2000, he had a fight with his wife because of his

ex-wife's son. He said did not recall fighting with his before that, that he occasionally had arguments but not a fight such as this. He states that he has not had any problems with his wife since this incident. The respondent testified that he feels sorry about what happened. He regrets it and that he does have a good relationship with his wife now and with his children.

The respondent was questioned as to where the children were today. He indicates that they are at school and he has not informed them of the ongoing immigration proceedings because he believes the children are too young for this. The respondent was then questioned about where his wife was. He indicated that his wife was out of town, testifying that there was a family emergency and that she was in Korea.

The respondent testified that since he has been in the United States for 23 years it would very different to live in Korea and he would not know how to adjust to life there. He states that he believes he should be given a second opportunity to remain in the united States because he will do his best and he would very much appreciate the opportunity to stay with his wife and children. The respondent testified that he learned from this instance that he would not hurt anyone in the future.

The respondent testified that he is active in his community by his participation in the Catholic church and he does provide turkeys to people in the inner city. The respondent has submitted a letter from the Korean Women's Association indicating that he does donate funds to assist them by providing food to inner city residents. He also claims to donate money to various charitable groups testifying initially that he donated $30,000 to his church to build a school. He also indicated that he contributed money to the school where his children attend. The respondent testified that he is unable to visit with his brothers and sisters and mother as frequently since he is on probation now and he formerly used to visit with them at least one time a month. But because he is on probation as required as a result of his probation to undergo alcohol testing once a week, he cannot visit them.

The respondent was then presented by his counsel several documents prepared by his children. They are homemade cards. See Exhibit 4, tab 9, A through F. He stated that his daughters would rather make cards than buy them and particular indicating that they were made this year, that is, 2001, by his

daughter for him. The respondent testified that he spent a good deal of time with the children, indicating that he does spend many hours with them in swimming and going shipping. He states that he is involved with their school activities, has attended open houses and participated in activities there, and went with the children when they returned to school after this summer's vacation. He states that in the morning he is very busy with his daughters, combing their hair and doing things with them to get ready for school.

Also testifying on behalf of the respondent was the respondent's brother-in-law, Kyong Kil Oh. The witness testified that he has been in the United States since approximately June 2001.[2] He states that he has visited Mr. Kim in the United States on three occasions although he could not remember the first, indicating that he did come to the United States in December 1999 and was here until January 2000. The witness testified that he was currently staying in Farmington in a house. He states that he resided there with the three children and Mr. Kim and Mr. Kim and his wife living there. The witness was

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[2] Examination of Mr. Oh's passport indicates he entered the United States on June 25, 2001, and has authorized admission until December 25, 2001.

questioned as to where Mrs. Kim was. He testified that she was in Korea and he was aware of this because she called from South Korea to speak to her children. He stated that he answered the phone and put the children on the phone. The witness then was asked as to whether Mrs. Kim had said anything about going to South Korea and he stated, on the first occasion that he
testified about this, that she mentioned buying land and further stating that she went to Korea on personal business.

This witness testified that the respondent has a good relationship with his children. They spend time playing together. He states that the relationship between Mr. and Mrs. Kim is also good. She is planning to open a restaurant. Mr. Kim is helping her do that.

This witness testified that he was in the united States on January 4, 2000. He stated that he was with Mr. and Mrs. Kim and they were all drinking. He stated that at the time of the incident Mrs. Kim was drinking. They got into an argument. She poured a bottle of beer on her husband's face and he stated that at that point Mrs. Kim grabbed her husband's penis. He tried to pull her away and Mr. Kim tried to get away from his wife and was unable to do so. He

testified that Mr. Kim then grabbed a wirecutter which was apparently near the dining room table. The witness testified that he took that away from Mr. Kim and that the husband and wife struggled for awhile. He then testified that he took Mr. Kim out of the home and Mrs. Kim called the police. The witness stated initially that he did not give a statement to the police until the next day, but he did advise the police that Mr. Kim did not actually use the wirecutters or scissors. The witness testified he was unaware of any other fights between Mr. and Mrs. Kim. He states that Mr. Kim has expressed remorse for this incident.

Also testifying on behalf of the respondent was a family friend of the respondent, Kyong Im. She testified that she has known the respondent and his wife eight, nearly nine, years socially being family friends. She described Mrs. Kim as being very close, like sisters. She stated that while they did not see each other regularly, they have gone out of town on vacations at least a couple times a year and that she and Mrs. Kim call each other every day. She stated that she has seen Mr. Kim with the children, indicating that because he is a businessman when she visits he is frequently there. She states that he is very close to the children and the children love him. She also stated that she had seen Mr. and Mrs. Kim

argue one time. However, she described them as a regular husband and wife. She stated that she was aware of the incident because Mrs. Kim had called her about it and Mr. Kim stayed with her following the arrest for a period of time although she did not discuss this matter with him. She states that for the last five months they have been together that she is aware of and she has seen them together. They appear to be very close and that their marriage is fine.

STATEMENT OF THE LAW

Section 240A(a) of the Act provides for cancellation of removal by the Attorney General if the alien can establish that he has been lawfully admitted for permanent residence for not less than five years and has resided in the United States continuously for a period of at least seven years after having been admitted in any status. The alien must further show that he has not been convicted of an aggravated felony. Further, the respondent must show that relief is merited in the exercise of discretion. Section 240A(a) of the Act.

The Board of Immigration Appeals has noted that in considering applications for relief under this section, the Court can balance the adverse factors

evidencing the undesirability of the alien as a permanent resident against the social and humane consideration factors presented on the alien's behalf. Matter of C-V-T-, Int. Dec. 3342 (BIA 1998); Matter of Marin, 16 I&N Dec. 581, 584-85 (BIA 1978).

The Board has found that factors applicable to consideration under relief under former Section 212(c) of the Act are equally relevant to consideration of cancellation of removal under Section 240A(a) of the Act. Matter C-V-T-, supra. These factors include family ties in the United States, duration of residence (particularly when inception of residence occurred at a young age), evidence of hardship to the respondent and his family if deportation occurs, service in the military, history of employment, existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to the respondent's good character. Matter of Marin, supra.

Equally applicable for consideration by the Court are adverse factors such as the nature and circumstances of the grounds of removal, the existence of additional significant violations of the immigration law, the existence of a criminal record, and, if so, the recency, nature, and seriousness, as

well as other evidence of the respondent'S bad character or undesirability as a permanent resident of this country. Matter of Marin, supra. While the existence of minimum equities may be sufficient in some cases to establish eligibility for the relief sought, as the negative factors grow greater and/or more serious, it becomes incumbent on the respondent to establish offsetting favorable equities. Matter of Edwards, 21 I&N Dec. 191 (BIA 1990); Matter of Arreauin, Int. Dec. 3247 (BIA 1995).

Where a respondent has a criminal record, he will ordinarily be expected to establish rehabilitation in order to merit this favorable exercise of discretion. Matter of Buscemi, 19 I&N Dec. 628 (BIA 198B). However, these applications must be evaluated on a case by case basis with rehabilitation as a factor to be considered in the exercise of discretion. Matter of Edwards, supra.

RESPONDENT'S APPLICATION FOR SECTION 240A (a) RELIEF

It is undisputed that the respondent meets the minimum statutory eligibility requirements to apply for relief under Section 240A(a) of the Act. He was admitted as a lawful permanent resident in 1978. His first arrest according to his testimony in the evidence

of record occurred in 2000. The issue in this case is whether the respondent has demonstrated that he warrants the exercise of the Court's discretion.

The respondent has presented considerable equities. He is the father of four United States citizen children of which he has submitted three birth records. The respondent has resided in the United States for some 23 years. His mother and siblings are apparently either permanent residents or citizens although the record is devoid of evidence with the exception of a naturalization record from what appears to be the respondent's mother. At the time of his admission to the United States he was 18. The respondent and his witnesses have stated that he is close to his children. The respondent has testified that he is remorseful of the events and that he will suffer hardship if he is deported.

On the surface of this case, as pointed out by Government counsel in his closing argument, this would appear to be a case where the minimum equities might be sufficient to establish eligibility for the relief requested. However, this case has taken a rather serious turn during the course of the respondent's testimony and the testimony of his witnesses. Initially, the respondent elected to testify in English and no request was made for an

interpreter. However, during the course of the testimony, it became clear that the respondent either was having some difficulty in expressing himself or understanding the questions asked. The Court then contacted and obtained an interpreter in the Korean language to provide the respondent the opportunity to have a full and complete understanding of the questions asked. The Court would note that the respondent has testified that he has been in the United States for 23 years. He has operated at least four to five businesses depending on his testimony for 11 years and dealt with suppliers and employees in these businesses.

He testified that he dropped out of college although he completed high school in Korea prior to coming to the United States and he appears to be an intelligent individual who has an understanding of the nature and purpose of these proceedings. I elaborate on this because I cannot otherwise explain the nature of the testimony which this respondent offered. The respondent was extensively cross-examined by Government counsel. I would note that on his initial questioning by his own counsel, the respondent testified initially that this was the only arrest that he had had. He also testified that his wife was not able

to be present because she had to fly to Korea because of a family emergency having to do with her sister. The respondent testified that he has not told his children about his immigration problems because of their tender years and offers the cards written by the children. The respondent testified on direct examination that these were written and prepared for him by his children this year. The respondent was questioned as to who lived with him and he stated that he has been living with his wife and three daughters for the last several years. All of this was proffered on direct examination.

On cross-examination, the respondent was again asked by Government counsel how long he had been living with his wife. He indicated that they had lived together for the past several years and was asked by Government counsel on at least two occasions about this. The respondent was then questioned as to why his daughter Annie (see group Exhibit 4, tab 9, subtab D) would send him a letter which was written this year which states in pertinent part "Dear Daddy, I love you and miss you a lot and wished you could live with us and even wish that Mommy changed her mind and let you live with us. But I wanted to tell you that on your birthday can you pick us up or come to our house because I want to give you your birthday

present and birthday card. Don't tell me to save it till Sunday because I don't want to save it till Sunday. I want to give it to you on your birthday. Love, Annie Kim." The Court notes that this card is embellished with a heart in which the child has printed "Happy Father's Day." The Court would further note that Father's Day is in June and the respondent's birthday is in August, specifically August 15. When questioned by this, the respondent then indicated that he was ordered by the Court following his plea of guilty to stay away from the family home for six months and that the child's letter was written during this period. when he was confronted with the fact that his earlier testimony was he received this from his daughter, Annie, in 2001, then stated that his wife drinks a lot and becomes angry and throws him out of the house when she has PMS and that the child may have this during that time. The respondent came up with several facile explanations, none of which were consistent with each other and none of which are persuasive. The respondent's description of events is certainly significantly different. The respondent testified that his wife slapped his cheeks so he grabbed her collar then grabbed her neck. He stated that when he grabbed his wife's neck, she grabbed his penis. He pushed her away. He grabbed

her hair. They were angry so they had an argument. The respondent denied threatening to kill his wife and he denied grabbing a fireplace poker and swinging it. He further denied that he used a pair of scissors, stating initially he used a bench, but then stating it was not a bench, it was wirecutters. The respondent was questioned as to the witnesses who provided statements to the police. See Exhibit 4. The respondent stated that the Ok Kyong Sub who gave a statement to the police was his elder sister and states that his wife assisted her in giving the statement because she speaks English and his sister did not. He states that his sister's statement was not true and he believes that she would provide an untruthful statement because she has a "Korean mindset" and she thought he should be punished and needed to help his wife and that is why his sister gave a statement about the events which was not true. He stated that his sister's husband was also present although indicating that he did not speak English.

The respondent was then questioned again about why his wife was not present. The respondent stated that she was not present because there ~as an emergency and she had to go to Korea. Her sister was sick. The Court would note that on questioning of the

respondent's two witnesses, his brother-in-law stated that he spoke to Mrs. Kim, that initially the brother-in-law stated that she went to buy land, and then later stated that this was a trip that followed an earlier trip where she was unable to complete the purchase of land. Then the witness stated that she went to Korea because she is opening a new restaurant which Mr. Kim is helping her with and she went to buy dishes for this restaurant, although he only assumed this to be the case. The second witness testified that Mrs. Kim left on a trip to buy dishes for her new restaurant and the restaurant was supposed to have open October 10 but the opening was delayed. The Court notes that there is no affidavit from Mrs. Kim and no information on which this Court can make any determination about the truth of any of these assertions and only notes that they seem to inconsistent internally and, in the respondent's case, inconsistent between direct and cross-examination.

The respondent claims to have donated significant sums of money to charity. When questioned about evidence of this, the respondent then stated that he took a loan out and he is making payments on it. The respondent claims that he gave at first $30,000 and then later $20,000 and then

$13,000 to the Catholic Church. The Court would note that in his examined tax returns submitted by the respondent (see Exhibit 13, tabs A through H) and the 1998 and 1999 tax returns show the sum together of approximately $6500 to charity. Although it references statement 3 to determine the object of the charity, no statement 3 is attached to the tax return. The Court is unable ascertain what those contributions were directed to. The respondent claims to have donated other sums to other charities but no evidence of this other than a generalized statement by the Korean Women's Association that the respondent has participated in their support distributing food, painting the town, and distributing goods to inner city needy friends around Thanksgiving and Christmas. The respondent in his application (see Exhibit 3, question 56) states that he is not a member of any organizations. Yet today he testified that he is a member of the Lions and other groups which are too numerous to mention. The Court would note that no evidence of this has been submitted. The respondent has submitted no documentary evidence from the church which shows contributions to them in the amounts which he claims.

The respondent was questioned extensively by Government counsel as to whether or not he had any other arrests. The respondent states that he did not. He was questioned again as to whether he had any arrests in any countries of the world. The respondent stated that he did not on at least two occasions. The respondent was then questioned about an arrest in Korea December 23, 1976, under the violent force control act (see Exhibit 8) where the respondent was given six months probation. The respondent then indicated that he did recall that. However it was a false accusation. The Court would note the police report indicated the respondent was alleged to have joined a fight, gripped one of the combatant's neck, taking him to the floor, then kicking his neck and waist several times injuring the victim. See Exhibit 8. The respondent indicated that was his only arrest in Korea and then when his recollection was refreshed about being fined tor violations of the conscription act, he initially stated that he did not remember, and then stated that his sister took care of the matter.

The respondent was also questioned about an event in Inkster and only after extensive questioning and numerous denials did the respondent then indicate that there had been an incident where he did

go to court where there were charges of counterfeiting and forgery against one of his businesses lodged.

The respondent's two witnesses were questioned about whether or not the respondent resided with his wife. The respondent himself indicated that in the last few months he had been thrown out of the home by his wife on at least one occasion, if not more, when his wife was drinking and had PMS. Both the respondent's witnesses indicate that to their knowledge, particular Mr. Oh stating that he has resided there since June 25 until October 1 and on no occasion during that time had the respondent left the family home, although there were cases when he came home late because of his work. The respondent's second witness also indicated that this was not to her knowledge and she spoke to Mrs. Kim on a daily basis and, although she was aware of a prior incident, that is, prior to January 4, 2000, where Mr.
Kim was evicted by his wife from the family home, she was not aware of anything since that time.

The inconsistencies between the respondent's testimony and the testimony of his witnesses were so serious in this case. The Court can only describe them as providing false testimony. The respondent's testimony has been vague, nonresponsive. It has not

been consistent internally. The Court has provided the respondent with an interpreter to assist him in conveying information in this case. The respondent has failed to do so and his testimony is perhaps best described as evasive. Although not material to the claims herein, the Court would note that on one occasion the respondent was asked by counsel as to the earnings of his business. He claimed that his business earned two million dollars. When confronted with his own tax returns which shows that the businesses earned only $500,000 aggregating both returns (see Exhibit 5, tabs 17 and 18), the respondent then stated that he bought two new businesses this year and this year the businesses are making two million dollars. Neither the respondent's personal tax returns nor his business tax returns support these assertions. The respondent's testimony about his wife's failure to be here is certainly questionable. I am deeply troubled by the fact that the respondent's family has not presented any evidence in this case. His siblings have not written one letter. There is no affidavit. Although his brother-in-law traveled from Korea to testify, his sister did not even provide an affidavit, that is, not his sister in Korea nor any of the permanent resident or citizen siblings. The respondent's own wife is not

present. It would appear that there is some basis to believe that she went to Korea to conduct business. This case has been scheduled for nine months and there is no explanation for her failure to appear, no viable or credible explanation for the failure to appear. There is no doubt that the respondent has three children. The effect of deportation on these children is subject to question. There is no evidence as to the effect other than the respondent and his two witnesses which quite frankly the Court does not find to be tremendously credible in this case. Both witnesses appear to be willing to provide any statements to assist the respondent and the statements are certainly not consistent and certainly not consistent with objective evidence submitted. See Exhibit 4. The respondent's own wife did not even write an affidavit stating that she wished her husband to remain in the United States to assist her in the raising of their three citizen daughters. While two of the children certainly are quite young, the respondent does have a 10-year-old child and that child has not written anything to indicate the effect it would have on her should her father not be present. Indeed, according to that child, the respondent is not present. Despite the respondent's claims of rehabilitation, I find that his claims of remorse and

rehabilitation to be empty given to his otherwise incredible testimony to this Court. Rehabilitation is not demonstrated by an individual who provides false testimony to a court who is considering whether or not to permit him to remain in the United States. This is contrary to any claims of either remorse or rehabilitation. Rather it speaks to someone who will do anything to achieve his ends.

The Court finds that despite the respondent's long residence, despite the respondent's children arid siblings, the respondent has demonstrated to this Court that he does not deserve the exercise of discretion. The Court notes that the respondent pled guilty to aggravated domestic violence, and indeed it is not one, as Government counsel points out, of the most serious offenses which comes before this Court. Nevertheless, it is a serious offense and it is clear from the police report and the documentary evidence (see Exhibit 4) that the respondent did inflict harm and injury on his spouse, although he denies doing so. The Court therefore must find that the respondent has not established that he merits the exercise of its discretion and his application for relief will be denied. Based on the foregoing after having considered all of the evidence, the Court enters the following order.

ORDER:

IT IS ORDERED that the respondent's application for cancellation of removal under Section 240A(a) is denied and that the respondent be removed and deported from the United States to Korea on the charges contained in the Notice to Appear.

/s/ Elizabeth A. Hacker
ELIZABETH A. HACKER
Immigration Judge

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FILED
APR 11 2008
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SUPREME COURT, U.S.

No. 07-923

In the Supreme Court of the United States

TAE KYONG KIM, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that it lacked jurisdiction to review the Board of Immigration Appeals' denial of petitioner's request for discretionary relief from removal under 8 U.S.C. 1229b (2000 & Supp. V 2005).

2. Whether petitioner is removable because he committed a "crime of domestic violence" under 8 U.S.C. 1227(a)(2)(E)(i).

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In the Supreme Court of the United States

No. 07-923

TAE KYONG KIM, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The oral decision of the court of appeals (App., *infra*, 1a-3a[1]) is unreported. The order of the court of appeals affirming for the reasons stated from the bench (Pet. App. B1-B3) is unreported. The opinions of the Board of Immigration Appeals (Pet. App. C1-C5, E1-E3) and the immigration judge (Pet. App. D1-D9, F1-F28) are unreported.

[1] In this case, the court of appeals ruled from the bench, and no official transcript was prepared. Because petitioner did not include a transcript of the court of appeals' ruling with the petition, the government obtained an audio recording from the court of appeals and transcribed the relevant portion. App., *infra*, 1a-2a. The government will make the audio recording available to the Court upon request.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2007. A petition for rehearing was denied on October 10, 2007 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on January 7, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien is removable if he is convicted of a "crime of domestic violence." 8 U.S.C. 1227(a)(2)(E)(i). The Attorney General, in his discretion, may cancel an alien's removal if the alien meets certain eligibility requirements. 8 U.S.C. 1229b(a). To be statutorily eligible for cancellation of removal, an alien must demonstrate that he has been lawfully admitted for permanent residence for not less than five years, has resided in the United States continuously for seven years after having been admitted in any status, and has not been convicted of an aggravated felony. *Ibid.*

In addition to satisfying the three statutory eligibility requirements, an applicant for cancellation of removal must establish that he warrants such relief as a matter of discretion. *In re C-V-T-*, 22 I. & N. Dec. 7 (B.I.A. 1998). Whether an applicant warrants discretionary cancellation of removal is a case-specific determination made by "balanc[ing] the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented in his (or her) behalf to determine whether the granting of . . . relief appears in the best interest of this country." *Id.* at 11 (quoting *In re Marin*, 16 I. & N. Dec. 581, 584 (B.I.A. 1978)).

b. Since 1996, the INA has barred federal court review of certain discretionary decisions made by the Attorney General in immigration cases. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 306, 110 Stat. 3009-607. As pertinent here, the INA provides:

> [N]o court shall have jurisdiction to review * * * any judgment regarding the granting of relief under section * * * 1229b [the INA's cancellation of removal provision].

8 U.S.C. 1252(a)(2)(B)(i).

In 2005, Congress qualified this jurisdictional bar by providing:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. 1252(a)(2)(D) (Supp. V 2005).

2. Petitioner, a native and citizen of Korea, was admitted to the United States as an immigrant in 1978. Pet. App. F2-F3; A.R. 531. In March 2000, he pleaded guilty to a state domestic violence offense. Pet. App. F3; A.R. 531; see Mich. Comp. Laws Ann. § 750.81(2) (West 2004). The former Immigration and Naturalization Service commenced removal proceedings against petitioner. Pet. App. F2-F3. Petitioner conceded that he was subject to removal under 8 U.S.C. 1227(a)(2)(E)(i) because he had been convicted of a "crime of domestic violence," but he sought discretionary cancellation of removal. Pet. App. F3.

The immigration judge (IJ) found that petitioner was removable as charged and denied his application for cancellation of removal. Pet. App. F1-F28. She explained that, in addition to meeting the statutory requirements for cancellation of removal, petitioner bore the burden of demonstrating that "relief is merited in the exercise of discretion." *Id.* at F13. To determine if discretionary relief was warranted, the IJ "balance[d] the adverse factors evidencing [petitioner's] undesirability * * * as a permanent resident against the social and humane * * * factors presented on [his] behalf." *Id.* at F13-F14 (citing *In re C-V-T-*, 22 I. & N. Dec. 7 (B.I.A. 1998); *In re Marin*, 16 I. & N. Dec. 581 (B.I.A. 1978)).

The IJ performed a lengthy analysis of the positive and negative equities surrounding petitioner's application. Pet. App. F15-F27. She explained that petitioner's positive equities included that he has four United States citizen children, with whom he is close; that he has resided in the United States for 23 years; that his mother and sisters are in the United States; and that he has businesses and property in the United States. *Id.* at F16-F17. But the court also noted the substantial negative equities in petitioner's case. She explained that petitioner lied consistently during his hearing about his criminal history, his charitable contributions, and his businesses. *Id.* at F17-F24. For example, petitioner initially stated that he had no arrests other than for his domestic violence offense, but, after extensive questioning, he admitted to arrests for a violent crime in Korea and for counterfeiting and fraud in the United States. *Id.* at F23-F24. Similarly, petitioner originally claimed that his businesses were very successful and that he made significant charitable contributions, but those

claims were belied by his tax returns. *Id.* at F21-F22, F25.

The IJ recounted the circumstances of petitioner's domestic violence offense, in which he grabbed his wife by the throat, told her he was going to kill her, threw her on the floor, kicked her in the head, pursued her with a fireplace poker, and then attacked her with a scissors. Pet. App. F19-F20; see A.R. 491-500, 508-514. The IJ noted that petitioner's domestic violence offense "is a serious offense and it is clear from the police report and the documentary evidence * * * that [petitioner] did inflict harm and injury on his spouse, although he denies doing so." Pet. App. F27; see *id.* at F19-F20. The IJ also found that petitioner lied about whether he had reconciled with his wife and whether he still lived in their home. *Id.* at F18-F21, F24; see *id.* at F26 (noting that petitioner's "own wife did not even write an affidavit stating that she wished her husband to remain in the United States to assist her in the raising of their three citizen daughters").

Overall, the IJ found that petitioner's testimony was "inconsistent internally," Pet. App. F21, and that his "claims of remorse and rehabilitation [were] empty given [] his otherwise incredible testimony to this Court," *id.* at F26-F27. The IJ also found that petitioner's witnesses appeared to be "providing false testimony" and seemed to be "willing to provide any statements to assist [petitioner]," even if those statements were "inconsistent with [the] objective evidence submitted." *Id.* at F24, F26.

The IJ thus concluded that, despite petitioner's "long residence" in the United States, as well as his "children and siblings" here, he "does not deserve the exercise of discretion," because he committed a serious domestic

violence offense, did not demonstrate rehabilitation, and lied throughout his testimony. Pet. App. F26-F27.

Petitioner appealed, and the Board of Immigration Appeals (BIA) returned the case to the IJ because a tape of part of the Immigration Court proceedings was blank. Pet. App. E1-E3. The IJ held another hearing in which petitioner was permitted to put on additional evidence. A.R. 36-111.

The IJ again denied petitioner's application for discretionary cancellation of removal. Pet. App. D1-D9. The IJ noted that petitioner, despite "numerous opportunities to reconcile his testimony in his first hearing with his testimony" at the second hearing, continued to lie. *Id.* at D4. The IJ noted that, by the time of the second hearing, petitioner and his wife had divorced, and the IJ found that they had separated by the time of the first hearing, even though petitioner claimed that they had reconciled and were living together after his domestic violence offense. *Id.* at D4-D7. The IJ found that the significant negative equities (including the fact that petitioner "clearly provided false testimony * * * to obtain * * * cancellation of removal") outweighed petitioner's family ties in the United States, and thus there was "no reason to change [her] earlier decision" that petitioner did not deserve discretionary cancellation of removal. *Id.* at D8-D9.

3. The BIA affirmed. Pet. App. C1-C5. It rejected petitioner's argument that the IJ erred in balancing the positive and negative equities in his case, concluding that the "Immigration Judge properly found [petitioner] to be ineligible for a discretionary grant of cancellation of removal based on a balancing of the positive and negative factors in his case, including his 2000 conviction for domestic violence against his former wife which resulted

in her physical injury." *Id.* at C3. The BIA agreed with the IJ that petitioner failed to demonstrate "genuine rehabilitation or remorse which would tip the balance of the equities in [petitioner's] favor." *Id.* at C4. The BIA also noted petitioner's "lack of candor" as a negative factor. *Id.* at C3 n.2.

The BIA also rejected petitioner's challenges to the procedures used at the hearing, concluding that petitioner was properly placed under oath when he decided to stop testifying in English and start testifying in Korean and that the IJ did not improperly "hold[] [petitioner] criminally responsible for perjury and providing false testimony." Pet. App. C4-C5.

4. The court of appeals affirmed in a ruling from the bench at the conclusion of oral argument. App., *infra*, 1a-3a. The court first found that it had no jurisdiction to consider petitioner's argument that the BIA should have balanced the equities differently in his case and granted him discretionary cancellation of removal. *Ibid.* The court explained that petitioner's argument was that there "was an abuse of discretion in the [agency's] weighing of the factors," but that "the immigration judge in both hearings and the BIA in its written decisions did balance the equities," and its discretionary decision to deny cancellation is not reviewable under 8 U.S.C. 1252(a)(2)(B) (2000 & Supp. V 2005). App., *infra*, 2a; see Pet. C.A. Br. 13-16.

The court also rejected petitioner's argument (Pet. C.A. Br. 19) that the BIA denied him due process by "deny[ing] his applications based on conclusions that are unsupported by the record or that resulted from a mischaracterization of the evidence." The court held that "there was plenty of due process here" because "all the normal aspects of due process were carried out":

petitioner was able to be heard, was represented by a lawyer, and had a translator available when he decided to testify in Korean. App., *infra*, 2a. The court noted that petitioner was trying to "cloak a[n] abuse of discretion argument [as] a due process argument" and that his argument that the agency abused its discretion in weighing the equities simply was not reviewable. *Ibid.*

The court of appeals then issued a written order in which it "affirmed" "for the reasons stated from the bench." Pet. App. B1-B3.

ARGUMENT

1. Petitioner contends (Pet. 10-16) that the court of appeals erred in finding that it lacked jurisdiction to review the BIA's denial of the discretionary relief of cancellation of removal. The decision below is correct, and it does not conflict with any decision of this Court or any other court of appeals. The decision below is also unpublished and non-precedential, and thus it cannot give rise to the type of circuit conflict that could warrant this Court's review. Further review of petitioner's fact-bound claim is therefore unwarranted.

a. The court of appeals correctly found that it lacked jurisdiction to review petitioner's claim that his situation merited a discretionary grant of cancellation of removal. Under the express terms of 8 U.S.C. 1252(a)(2)(B)(i), no court shall have jurisdiction to review a judgment "regarding the granting of relief under * * * [8 U.S.C.] 1229b." The relief petitioner sought, discretionary cancellation of removal, is relief under Section 1229b, Pet. App. F3, and his argument on appeal was that the BIA erred in denying him that discretionary relief based on a consideration of the positive and negative equities in his particular case. App., *infra*, 2a; see Pet. C.A. Br. 13-

16. The court of appeals thus correctly found that it lacked jurisdiction to consider the argument under Section 1262(a)(2)(B).

The court of appeals also correctly found that petitioner's claim does not fall within the statutory exception permitting federal-court review of "constitutional claims or questions of law." 8 U.S.C. 1252(a)(2)(D) (Supp. V 2005). As petitioner himself has recognized (Pet. 2; Pet. C.A. Br. 12-13), cancellation of removal is discretionary, and whether an applicant has met his burden of demonstrating that cancellation is justified depends on the facts of his particular case. See *In re C-V-T-*, 22 I. & N. Dec. at 10-12; *In re Marin*, 16 I. & N. Dec. at 584-585. Here, there was no serious dispute about the applicable legal standards; as both the IJ and the BIA recognized, settled legal precedent directs the weighing of the positive and negative equities to determine if an exercise of discretion is warranted in the particular case. See Pet. App. C3, F13-F15. Petitioner's argument was that the BIA should have granted him cancellation of removal in the exercise of discretion because he did not intend to deceive the IJ and because he showed sufficient evidence of remorse for his domestic violence offense. See Pet. C.A. Br. 13-16; see also Pet. 13-14. Petitioner's disagreement with the IJ's and BIA's application of settled precedent to the facts of his case does not raise a "constitutional claim[]" or "question[] of law." Instead, his claim is nothing more than a challenge to the exercise of the BIA's broad discretion, and "challenges to the exercise of routine discretion * * * do not raise 'constitutional claims or questions of law.'" *De La Vega* v. *Gonzales*, 436 F.3d 141, 146 (2d Cir. 2006); see App., *infra*, 2a.

Although petitioner attempted to recast his claim as one raising questions of law by asserting that the BIA departed from its own precedent, Pet. C.A. Br. 13-16, the court of appeals correctly recognized that the claim was nothing more than a challenge to the agency's discretionary decision. Petitioner and the government agreed on the governing legal standard, Pet. C.A. Br. 12-13; Gov't C.A. Br. 22, and petitioner's argument that the BIA failed to follow its own precedent was simply an argument that the BIA should have given more weight to his assertions of rehabilitation and remorse, Pet. C.A. Br. 15-16. Similarly, while petitioner now suggests (Pet. 11) that the BIA improperly "ma[de] its own findings of fact," he does not identify what facts the BIA impermissibly found or how such fact-finding constituted legal error, and the BIA's decision makes clear that it relied on the IJ's factfinding, see Pet. App. C1-C5. Petitioner's claim amounts to a quarrel with the manner in which the IJ and the Board balanced his equities, and thus the court of appeals lacked jurisdiction to consider that claim. Indeed, if petitioner's challenge to the BIA's exercise of its statutorily conferred discretion were considered a "constitutional claim[] or question[] of law" under Section 1252(a)(2)(D), that phrase would lose all meaning. See, *e.g.*, *Higuit* v. *Gonzales*, 433 F.3d 417, 420 (4th Cir.) ("We are not free to convert every immigration case into a question of law, and thereby undermine Congress's decision to grant limited jurisdiction over matters committed in the first instance to the sound discretion of the Executive."), cert. denied, 126 S. Ct. 2973 (2006).[2]

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[2] Review is also unwarranted because even if the court of appeals had jurisdiction to review petitioner's claim, the result in this case would be

The court of appeals also correctly rejected petitioner's attempt to recast his disagreement with the agency's discretionary decision as a due process claim. Petitioner's sole "due process" argument was that he was deprived of "a meaningful opportunity to present his application" "when the BIA denied his applications based on conclusions that are unsupported by the record or that resulted from a mischaracterization of the evidence." Pet. C.A. Br. 19. Petitioner's invocation of the Due Process Clause does not change the nature of his claim, which amounts on this record to nothing more than a challenge to the agency's exercise of its discretion. As the Third Circuit recently explained, the federal courts of appeals "are not bound by the label attached by a party to characterize a claim and will look beyond the label to analyze the substance of a claim" in determining whether a claim is reviewable under Section 1252(a)(2), because "[t]o do otherwise would elevate form over substance and would put a premium on artful labeling." *Jarbough* v. *Attorney Gen. of the United States*, 483 F.3d 184, 189 (3d Cir. 2007).

In any event, in addition to finding that it lacked jurisdiction over petitioner's claim cloaked in due process terms, the court of appeals also found no substance to the claim insofar as foundational elements of due pro-

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the same, because neither the IJ nor the BIA adopted a new legal rule for evaluating applications for cancellation of removal. For example, petitioner suggests (Pet. 13-14) that the BIA changed its legal standard to require a showing of rehabilitation or remorse in every case. But settled BIA precedent makes clear that, while rehabilitation is not an absolute prerequisite in every cancellation case involving an alien with a criminal record, it may be considered as a relevant factor and an applicant "who has a criminal record will ordinarily be required to present evidence of rehabilitation before relief is granted as a matter of discretion." *In re C-V-T-*, 22 I. & N. Dec. at 12.

cess were concerned, concluding that petitioner received a fair hearing and all the process he was due. App., *infra*, 2a. Petitioner contends (Pet. 14) that he has a due process right to a grant of discretionary cancellation of removal, but due process guarantees that a certain process be followed, not that a certain outcome be reached. *E.g., In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 768 (3d Cir.) ("[P]rocedural due process does not protect litigants from any particular outcome; instead it protects litigants from arbitrary denials of rights."), cert. denied, 493 U.S. 821 (1989). Petitioner's "attempt to 'dress up' his challenge with the language of 'due process'" is insufficient to establish federal-court jurisdiction over his claim. *Avendano-Espejo* v. *Department of Homeland Security*, 448 F.3d 503, 505-506 (2d Cir. 2006). "[A]liens have no fundamental right to discretionary relief from removal for purposes of due process and equal protection." *Tovar-Landin* v. *Ashcroft*, 361 F.3d 1164, 1167 (9th Cir. 2004). While petitioner does have a liberty interest in avoiding removal from the United States, that liberty interest is accorded constitutionally adequate due process by affording petitioner notice and an opportunity to contest the charge of removability, which was done in this case.

b. Petitioner asserts without explanation (Pet. 8-10, 15-17) that the unpublished, oral decision below conflicts with other Sixth Circuit decisions and with decisions of the Third, Seventh, Eighth, and Ninth Circuits. Petitioner is mistaken. Moreover, the unpublished oral decision below could not give rise to the type of conflict in published decisions in the courts of appeals that would warrant this Court's review.

As an initial matter, the alleged conflicts between the decision below and other Sixth Circuit decisions provide

no basis for this Court to grant review, because it is not the Court's task to reconcile intra-circuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957); Sup. Ct. R. 10. If a conflict existed, it should be left for the Sixth Circuit to resolve.[3]

Further, the decision below does not conflict with the decisions of the Third, Seventh, Eighth, and Ninth Circuits cited by petitioner. See Pet. 10, 15-16. In three of those cases, the courts of appeals recognized that they generally lacked jurisdiction to "review the BIA's decision to deny an alien cancellation of removal" but noted that they could consider purely legal questions. *Solano-Chicas* v. *Gonzales*, 440 F.3d 1050, 1054-1055 (8th Cir. 2006); see *Morales-Morales* v. *Ashcroft*, 384 F.3d 418, 421 (7th Cir. 2004) (finding jurisdiction to review statutory interpretation question regarding eligibility requirements); *Cabrera-Alvarez* v. *Gonzales*, 423 F.3d 1006, 1009 (9th Cir. 2005) (similar). The other case concerns withholding of removal, a different form of relief than cancellation of removal, and it is inapposite because the court there found that the decision at issue was not a discretionary decision entrusted to the Attorney General, whereas petitioner concedes that the BIA's deter-

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[3] In any event, there is no such conflict. *Abu-Khaliel* v. *Gonzales*, 436 F.3d 627, 630-631 (6th Cir. 2006), addressed jurisdiction to review a denial of a continuance, not a denial of cancellation of removal, and thus presents no conflict. *Santana-Albarran* v. *Ashcroft*, 393 F.3d 699, 703 (6th Cir. 2005), is similarly inapposite. In that case, the court of appeals stated that a finding that an alien "failed to demonstrate a continuous physical presence," one of the statutory eligibility requirements for cancellation of removal, "is a non-discretionary factual determination and properly subject to appellate review." *Ibid.* In this case, in contrast, there is no question raised about continuous physical presence; petitioner merely disagrees with the BIA's weighing of the equities.

mination that he does not merit cancellation of removal is such a discretionary determination. See *Alaka* v. *Attorney Gen. of the United States*, 456 F.3d 88, 101, 103-104 (3d Cir. 2006) (finding jurisdiction to consider statutory interpretation question regarding eligibility for withholding of removal).

Petitioner has not explained how the decision below is in conflict with any of the decisions he cites or even what predicate legal question he believes is in dispute in his case. The fact that courts have recognized that other applicants for cancellation of removal raising other, different claims, such as statutory interpretation arguments, have raised questions of law does not mean that those decisions conflict with the decision below. Rather, it highlights the fact that petitioner's challenge was merely a disagreement with the BIA's weighing of the equities in making a purely discretionary decision. And the courts of appeals agree that they lack jurisdiction to review such a claim. See, *e.g.*, *Elysee* v. *Gonzales*, 437 F.3d 221, 223-224 (1st Cir. 2006) (because the alien's claim merely "attack[ed] * * * the factual findings made and the balancing of factors engaged in by the IJ," it "d[id] not raise even a colorable constitutional claim or question of law"); *Higuit*, 433 F.3d at 420 (no jurisdiction to review alien's claim that the IJ erred in "balanc[ing] [the alien's] positive and negative attributes" because it was "an equitable determination based on factual findings rather than a question of law").

2. Petitioner contends (Pet. 9, 16-19) that he is not removable because he was not convicted of a crime of domestic violence. That claim was raised for the first time in the petition for a writ of certiorari, and review should be denied on that basis. Moreover, petitioner asserts no disagreement in the circuits on this point, and

the finding of removability is correct. Petitioner's fact-bound claim therefore does not warrant further review.

Petitioner's new claim was not included in any brief to the court of appeals, nor was it raised in the petition for rehearing en banc. Not only did petitioner fail to raise the claim below, but he has conceded throughout this litigation that he is removable based on his domestic violence conviction. See Pet. App. F3 ("[Petitioner] further conceded that he was subject to removal under Section 237(a)(2)(E)(I) of the Act."); Pet. C.A. Br. 3 ("[Petitioner] admitted that the allegations contained in the [Notice to Appear] were true, conceded that he was subject to removal, and applied for cancellation of removal."); see also A.R. 255-256, 476-485. Petitioner acknowledges this concession in his certiorari petition and makes no attempt to explain why he did not raise his claim below. See Pet. 7 ("In removal proceedings conducted in Detroit, Michigan, [petitioner] conceded removability and applied for cancellation of removal."). Because petitioner did not raise the issue before the BIA and thus failed to exhaust his administrative remedies on the claim, a reviewing court is without jurisdiction to consider it. See 8 U.S.C. 1252(d)(1). Review is also unwarranted under this Court's consistent practice of declining to review contentions not presented to or decided by the court of appeals. See, *e.g.*, *Gonzales* v. *Duenas-Alvarez*, 127 S. Ct. 815, 823 (2007) (collecting cases).

In any event, the record supports the IJ's determination that petitioner is removable as charged because he committed a "crime of domestic violence." The INA provides that an alien is removable if he is convicted of a "crime of domestic violence," and it defines a "crime of domestic violence" as "any crime of violence (as defined

in section 16 of title 18) against a person committed by a current or former spouse." 8 U.S.C. 1227(a)(2)(E)(i). Under Section 16 of Title 18, a "crime of violence" includes "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 16(a).

Petitioner was convicted of domestic assault under a Michigan law that prohibits "assault[ing] or assault[ing] and batter[ing]" a spouse or other member of the household. Mich. Comp. Laws Ann. § 750.81(2) (West 2004); see A.R. 503, 517; Pet. 6. That crime has the attempted or threatened use of force as an element because it requires an "assault," which the Michigan courts have defined as an "intentional unlawful offer of corporal injury to another person by force, or force unlawfully directed toward the person of another, under circumstances which create a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish the contact." *Espinoza* v. *Thomas*, 472 N.W.2d 16, 21 (Mich. Ct. App. 1991). Thus, a conviction for domestic assault satisfies the statutory definition of a "crime of violence" under 18 U.S.C. 16(a).[4]

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[4] Petitioner contends (Pet. 18-19) that his crime was not a "crime of violence" because a person can commit a battery in Michigan by "a mere 'willful touching.'" Petitioner's reliance on the definition of battery is misplaced because, as petitioner concedes (Pet. 6), the offense to which he pleaded guilty requires an assault. Although the definition of "assault" includes "an attempt to commit a battery," *Michigan* v. *Terry*, 553 N.W.2d 23, 25 (Mich. Ct. App. 1996), this Court's categorical approach even in criminal cases does not require that "every conceivable factual offense covered by a statute must necessarily" involve use, threatened use, or attempted use of force, so long as "the conduct encompassed by the elements of the offense, in the ordinary case," would involve such conduct. *James* v. *United States*, 127 S. Ct. 1586, 1597 (2007) (applying this approach determine whether a crime is a "violent

Moreover, even if petitioner's crime were not categorically a "crime of violence," the conviction documents make clear that his particular offense was such a crime. See *Shepard* v. *United States*, 544 U.S. 13, 26 (2005); *Taylor* v. *United States*, 495 U.S. 575, 599-602 (1990). The complaint and the judgment in this case state that petitioner "did make an assault upon [his wife] with a dangerous weapon, to-wit: scissors," and that petitioner's conduct "resulted in personal injury" to his wife. A.R. 487-491, 518. Those documents demonstrate that petitioner threatened to use, and did use, physical force against his wife. See *Lopes* v. *Keisler*, 505 F.3d 58, 62-63 (1st Cir. 2007) (concluding that similar Rhode Island assault and battery offense was a "crime of violence"). Petitioner concedes (16-17) that an offense can be a "crime of violence" under this modified categorical approach, and he presents no argument regarding why his conviction was not one for a "crime of violence." Further review of petitioner's forfeited, fact-bound claim is therefore unwarranted.

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felony"). The domestic assault offense for which petitioner was convicted is a crime that "by its nature" (*ibid.*) involves the use, threatened use, or attempted use of force, and thus it qualifies as a "crime of violence."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2008

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 06-3991

TAE KYONG KIM, PETITIONER

v.

ALBERTO GONZALES, ATTORNEY GENERAL
OF THE UNITED STATES, RESPONDENT

May 30, 2007

ORAL DECISION THE COURT OF APPEALS

Before: GILMAN, GIBBONS, and GRIFFIN, Circuit Judges.

All right, counsel, as in the previous case, we have authority under Rule 36 of the Sixth Circuit Rules to rule from the bench if the panel is convinced that—what the result should be, and there is no jurisprudential purpose of writing a written opinion. And we do so in—and this is an appropriate case where we will do that under Rule 36; and our ruling is going to be to uphold the ruling of the Board of Immigration Appeals.

This is an unusual case—as I said, it's not the typical asylum case—but a cancellation of removal decision which raises the question of whether we have jurisdic-

tion. And if we don't have jurisdiction then obviously whether we would otherwise agree with the discretion of the Attorney General as expressed by the immigration judge and the BIA is irrelevant. And the problem is that the Section 242(a)(2)(B) does say that we have no jurisdiction to review a discretionary relief under the cancellation of removal. And the argument by the petitioner basically is that they disagree; they feel that it was an abuse of discretion in the weighing of the factors. But in the case of the *C-V-T-* which is a 1998 decision it does say you balance the equities. Well, I don't think there's really any question in our mind that the immigration judge in both hearings and the BIA in its written decisions did balance the equities.

And I do think there is a valid argument or point made by the government's counsel that you can't cloak a[n] abuse of discretion argument into a due process argument. The question is what—unless there was a lack of due process here we simply have no jurisdiction to overrule the decision, the discretionary decision of the Attorney General and we find that there was plenty of due process afforded here. I mean, obviously there was a right to be heard, a right to counsel, right to a translator, all the normal aspects of due process were carried out here by the— both the immigration judge and the Board of Immigration Appeals. Therefore we conclude that we have no jurisdiction under Section 242(a)(2)(B) and therefore we'll invect [*sic*]—I guess technically we'll probably call it a dismissal of the appeal for lack of jurisdiction. A copy of this oral ruling will be available by transcript if either party desires through the clerk's office.

I'll ask if either counsel or either of my colleagues have anything further to add? No. That will be the ruling of the court. Thank you both very much.